NO. 85-904 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HENRY G. HERFORD,

Petitioner,

vs.

SUN PIPE LINE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT SUN PIPE LINE COMPANY

A. Richard Gear
HUDSON, POTTS & BERNSTEIN
Post Office Drawer 3008
Monroe, Louisiana 71210
(318) 388-4400

BEST AVAILABLE COPY

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed parties have an interest in the outcome of this case.

SUN COMPANY, INC.

SUN EXPLORATION & PRODUCTION CO.

SUN REFINING & MARKETING CO.

SUN TECH., INC.

SUN PIPE LINE COMPANY

SUN OIL TRADING COMPANY

SUNOCO ENERGY DEVELOPMENT CO.

RADNER CORPORATIONS

SUN CARRIERS, INC.

SUN DISTRIBUTORS, INC.

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STATEMENT OF THE CASE

This case was an action under Section 301 of the National Labor Relations Act, 29 USC §185 for breach of a collective bargaining agreement. The Petitioner's amended complaint alleged that at all times germane to the action, a collective bargaining agreement existed between Respondent and a labor organization, that the Petitioner was a member of the labor organization, that the collective bargaining agreement in paragraph 6 provided that no employee shall be discharged without "just cause", and that the Petitioner's discharge was without "just cause". (See Amended Complaint, ROA 86.) On May 3, 1984, Respondent filed a Motion For Summary Judgment based upon the primary grounds of failure to exhaust contractual remedies before filing a suit for breach of the just cause requirement of the union contract as required by *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 58 LRRM 2193 (1965) and failure to file the action within the 6-month limitation period for such cases established in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 113 LRRM 2737 (1983). The District Court granted the Motion For Summary Judgment, and the United States Court of Appeals for the Fifth Circuit after oral argument affirmed the judgment for Respondent. The case is a rather routine labor case which does not merit the consideration of the United States Supreme Court. Certain additional aspects of the case which are relevant to this Court's consideration are set forth herein.

On October 14, 1982, the Petitioner was discharged as the result of an investigation by his employer, the Respondent herein, which disclosed substantial evidence that the Petitioner had utilized employees of his employer's subcontractors to do personal work for him and that he was engaged in dishonest conduct including theft.

Although Petitioner claims in his argument that he had no knowledge of the reasons for his termination until November 1, 1982, he testified in his deposition that at the time of his termination on October 14, 1982, the company's security investigators asked him how he was handling records for charging out the time of subcontractors. The security investigators mentioned "something about stealing oil ... and how did I go about getting it and what did I use it for ... I don't know where they got the work 'stealing'; I never stole anything in my life. And I told him that I never stole any oil; I used if for the company business, burning trash and trees ... ." He admitted that he was accused of using some of the oil to burn relatives' grass, which he denied, and that he was accused of some misconduct in connection with cutting of hay. In fact, "they said something about the ... they had some evidence that the man that was working for me pretty regular was out there mowing cutting my hay ... Morgan, I believe is his - - his name." The Petitioner even made his employer an offer to pay them back anything they thought he owed them because "I didn't want anything like this to be against me, especially stealing crude oil." At this point, the employer's manager brought in the letter to discharge him which stated he was discharged for violations of company policy. (See Appendix C of Petitioner's Brief, A-19–A-24.) Despite these admissions in his deposition, the Petitioner argues to the Court that he did not know why he was fired until November 1, 1982, when he was advised by the Lousiana State Employment Security Office that the employer was contesting his unemployment claim based upon incidents of theft and dishonesty involving the misappropriation of company property and labor.

Petitioner had been a member of the Sun Pipe Line Employees Association, a labor arganization, since 1946 and admittedly had knowledge of the February 1, 1982 to 1984 union contract in effect at the time of his discharge which contained a grievance procedure. He himself had been

a union representative for 2 years and his brother was a union representative in the Dallas, Texas area. (See Petitioner's deposition, p. A-2–A-4, Appendix A).

The longstanding grievance procedure in the collective bargaining agreement contains 5 steps resulting in final settlement of the grievance in the last step. Step 1 requires an employee to process his grievance with his immediate supervisor within 15 days after the occurrence or after the occurrence becomes known to the employee. Step 2 requires the employee to submit the grievance to the Superintendent within 15 days of Step 1. Step 3 requires the submission of the written grievance to the Manager of Operations within 15 days of Step 2. Step 4 requires the submission of the grievance to the Vice-President of Operations and Engineering, and Step 5 requires the submission of the written grievance to the President of Sun Pipe Line Company for "final settlement". Each step may be taken alone or with the help of the union representative, and Section 3 of the grievance article expressly provides that employees may submit their grievances and have them adjusted without the intervention of a union representative. The collective bargaining agreement does provide that no employee will be discharged without "just cause". Thus, the procedure provides finality and exclusivity and is the means by which the union has bound itself and the employees to handle all disputes and grievances, including unjust discharges.

The Petitioner failed to advise this Court of his admission in his deposition that on October 20, 1982, after visiting his attorney, he contacted his Union representative, and asked for a copy of the Union's contract. Although the Union representative advised him he could file a grievance under the contractual grievance procedure over his discharge (Depositio p. A-5, Appendix B), The Petitioner chose to file no grievance within the 15-day limitation period and instead relied

upon his attorney to handle the matter by threatening litigation. This critical admission under oath was relied upon by the United States District Court in granting the Respondent's Motion For Summary Judgment with respect to his failure to exhaust the grievance procedure (see Petitioner's Appendix A-13–A-16).

The United States District Court also found, at Petitioner's Appendix C, pp. A-14–A-15, that "After the expiration of the 15-day period for filing grievances, set out in Article 6 of the Collective Bargaining Agreement, complainant's counsel contacted Sun Pipe Line by letter dated November 2, 1982, threatening litigation." Petitioner has attempted to characterize this November 2, 1982, threat of litigation as a grievance (Original Brief of Petitioner, p. A-67), using it as a springboard for his argument that the Respondent's failure to act upon this threat of litigation amounts to a repudiation of the grievance procedure in the union contract. This argument is clearly frivolous in light of the stipulation of Petitioner's counsel during the Petitioner's deposition that no grievance had ever been filed (Petitioner's deposition A-25, Appendix B).

Petitioner was discharged on October 14, 1982, but delayed filing his action in State Court until April 28, 1983 - - 6 months and 2 weeks later. The Complaint and Process were not served upon registered agents of the defendant in Louisiana until May 4, 1983 (See Petition for Removal). In virtue of this, the Respondent's Motion for Summary Judgment was based upon the alternative dispositive ground that Petitioner had not filed his lawsuit within the new 6-month limitation period articulated in *DelCostello v. International Brotherhood of Teamsters*, *supra*. The obvious merit of the *DelCostello* argument can be another basis for affirmation of the District Court's decision, and is additional ground for denial of the Petition for a writ of certiorari.

SUMMARY OF ARGUMENT

This petition for a writ of ceriorari should be denied because no circumstances falling within the ambit of United States Supreme Court Rule 17 are shown to exist. The Petitioner seeks a writ of certiorari to have this Court determine whether a genuine issue of fact exists which would preclude the grant of summary judgment below. A writ of certiorari should not be granted for the purpose of sifting through facts and inferences. Many of the arguments Petitioner makes to this court were not timely raised in the proceedings below, but in any case have no merit. No issue of national importance is present, and a writ of certiorari is inappropriate.

ARGUMENT

Petitioner has not alleged any reason falling within the considerations governing review on certiorari established by United States Supreme Court Rule 17. The case involves no conflicts among the federal courts of appeals, no departure from accepted and usual courses of judicial procedings, no important question of federal law which should be settled by this Courrt, and no conflict with applicable decisions of this Court. There are no issues of national significance, but rather the issues are of importance only to the litigants.

The United States Court of Appeals for the Fifth Circuit affirmed the granting of summary judgment for Respondent on the basis of the long-recognized principle that suits by individual employees for breaches of a collective bargaining agreement must be dismissed where there has been no exhaustion of the contractually established grievance procedure. See *Republic Steel v. Maddox, supra*. Actions of this type are typically handled by the summary judgment vehicle, and this case is simply another run-of-the mill labor case where summary judgment was appropriate. See e.g. *Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511 (7th Cir. 1985); *Buscemi v. McDonnell-Douglas Corp.*, 736 F.2d 1348 (9th Cir. 1984); and *Coe v. United Rubber Workers*, 571 F.2d 1349 (5th Cir.1978).

THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER FACTUAL ISSUES EXIST

With respect to Petitioner's Argument A, and indeed, all of his arguments, Petitioner admittedly seeks to have this Court find that a genuine factual dispute exists which he argues would theoretically preclude affirmance of the granting of Respondent's Motion For Summary Judgment. But this Court historically has not granted certiorari to review questions of evidence. "As such, we are presented primarily

with a question of fact which does not merit Court review." *N.L.R.B. v. Hendrix County Rural Electric Co-op.*, 454 U.S. 170, 176 at n.8, 102 S.Ct. 216, 70 L.Ed. 2d 323, 108 LRRM 3105 (1981). This is "... a factual issue which does not, by itself, justify the exercise of our certiorari jurisdiction ..."; *Tacon v. Arizona*, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed. 2d 346 (1973). *Rice v. Sioux City Memorial Cemetary, Inc.*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Further, the "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it". *General Talking Pictures Corp. v. Western Electric Company, Inc.*, 304 U.S. 175, 178, 82 L.Ed. 1273 (1938); *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 38 S.Ct. 140, 62 L.Ed. 385 (1918).

Petitioner further seeks to have this Court adopt his argument that his alleged lack of knowledge of the reasons for his discharge tolled the 15-day period for filing a grievance. It is noteworthy that Petitioner cited no legal precedent to support the argument. In doing so, Petitioner would have this Court disregard his own deposition testimony set forth above which shows that he was questioned about his dishonest conduct by company investigators seconds before he was discharged on October 14, 1982, and thus obviously knew why he was discharged. Respondent submits to the Court that this first argument of Petitioner would require an examination of the evidence below which is not the purpose of a writ of certiorari.

But regardless of when he learned of the reasons for his discharge, the law is clear in employment cases that the limitation period begins to run when the employee is notified of the personnel action or should have known of the injury, not at some later time when the consequences of the action allegedly may become more apparent. *Delaware State College v. Ricks*, 449 U.S. 250, 259, 101 S.Ct. 498, 66 L.Ed.2d 4311, 24 FEP 827 (1980). See also, *Chardon v.*

Fernandez, 454 U.S. 6, 27 FEP 27 (1980); *Cervantes v. IMCO*, 724 F.2d 511, 34 FEP 13 (5th Cir. 1984); *Farr v. H. K. Porter*, 727 F.2d 502 (5th Cir. 1984). Thus, the United States Court of Appeals for the Fifth Circuit was correct in rejecting this argument and in affirming the Court below. There is no issue of fact because the lower courts relied upon Petitioner's own deposition testimony. No national significance can be attributed to any questions arising out of these facts, and this Court should not waste its time deciding whether factual issues exist.

PETITIONER'S FUTILITY ARGUMENT IS UNTIMELY, NON-MERITORIOUS AND WOULD REQUIRE THIS COURT TO SIFT THROUGH THE EVIDENCE

With respect to Petitioner's contention (B) that the collective bargaining agreement does not provide an exclusive proceedure for resolution of employee grievances and that it would have been futile to do so because of lack of an impartial decision-maker, an examination of the record below will demonstrate that Petitioner failed to make these arguments to the District Court or in his original brief to the Fifth Circuit. (See briefs in Respondent's Appendix.) This issue was not raised in a timely manner below and should not be passed on for the first time by this Court in a writ of certiorari. See *Tacon v. Arizona*, *supra*. He has offered no evidence in support of this untimely contention. There is no affidavit or other evidence in the record which asserts that this was basis for Petitioner's failure to file a grievance, or that the decision maker was impartial. In the affidavit Petitioner filed in opposition to Respondent's Motion for Summary Judgment, he did not give the "lack of an impartial decision-maker" as the basis for his failure to file a grievance; rather, he talks in terms of his belief that the union would not handle a grievance for him because Respondent would have fired him, and that he knew he had to retain a lawyer to file his grievance (ROA 175). Moreover, in Petitioner's original brief to the Fifth Circuit at page 2,

he asserted that "... appellant is able to show that contractual grievance procedures were fully exhausted by his good faith effort to utilize all channels available for the resolution of his dispute with his employer." Yet he chooses now to advance a new futility theory to this Court. His theories are inconsistent, and his new theories are untimely. The Petitioner would have this Court sift through the evidence to make factual determinations with respect to legal theories which were not timely advanced to the courts below. This is not the function of a writ of certiorari.

In any case, the lack of an impartial decision-maker argument as an excuse for failing to exhaust a grievance procedure is limited to those *Glover*-type situations where both union and employer have conspired to violate the employee's rights. See *Glover v. St. Louis-San Francisco Railway Co.* 393 U.S. 324, 89 S.Ct. 548, 21 L.Ed.2d 519 (1969). In the instant case, the union actually suggested the applicability of the contractual grievance procedure, but the Petitioner did not file a grievance, relying instead on his attorney to handle the matter in a proper manner.

Respondent has shown that at the time of the events in question, a collective bargaining agreement was in effect between it and a labor organization known as the Sun Pipe Line Employees Association. The contract contained a 5-step grievance procedure which in its last step required submission of the grievance to the President of Sun Pipe Line Company for "final settlement". The union contract also contains a provision imposing a standard of "just cause" upon Respondent in the discharge or discipline of employees. This procedure was found by the United States District Court to be an "exclusive" procedure for the resolution of disputes with a resultant requirement of exhaustion before bringing suit. This conclusion was affirmed by the Fifth Circuit and is fully supported by the record and the law. See *Boone v. Armstrong Cork Company*, 384 F.2d 285

(5th Cir. 1967), and *Haynes v. United States Pipe & Foundry Company*, 362 F.2d 414, at 417 (5th Cir. 1966) where procedures ending in final decision by management were approved by the Fifth Circuit. Petitioner's arguments present no matters of national significance but rather reflect an isolated circumstance not warranting the attention of this Court.

PETITIONER'S REPUDIATION ARGUMENT IS UNTIMELY AND HAS NO MERIT

By the time one reads Petitioner's argument (C), the frivolity of this petition is apparent. He again desires this Court to analyze the record of this proceeding and determine whether the evidence establishes that the Respondent repudiated the grievance procedure so as to excuse his failure to file a grievance, by first, Respondent's failure to formally act upon his untimely grievance (threat of litigation) and by, second, Respondent's failure to notify him that the grievance (threat of litigation) was untimely. This novel argument was not advanced in his brief to the District Court or his original brief to the Fifth Circuit and has no merit on its face. (See briefs in Respondent's Appendix.) This issue was not raised in a timely manner below and should not be passed on for the first time by this Court in a writ of certiorari. See *Tacon v. Arizona*, *supra*. The failure to act upon an untimely grievance is not repudiation such as would excuse the failure to file a timely grievance. See *Boone v. Armstrong Cork Co.*, *supra*, for a discussion of repudiation as a refusal to resort to the grievance procedures. Its determination would require a weighing of the evidence in the record by this Court, which weighing is not the purpose of a writ of certiorari. It should be noted again that during Petitioner's deposition, Petitioner's counsel *stipulated* that he had not filed a grievance. Yet in Argument C he asks the Court to declare that the grievance procedure was repudiated

by Respondent's alleged failure to reply to his alleged grievance. (See briefs in Respondent's Appendix.) There obviously is no national significance to this issue.

CONCLUSION

Respondent submits that this case does not merit the granting of a writ of certiorari because the Petitioner desires the Court to engage in the function of analyzing a discrete set of facts and resultant inferences to consider arguments not made in a timely manner below, and because Petitioner desires a ruling as to whether or not this particular isolated Order of the Fifth Circuit with no national significance was correct. This case is a routine summary judgment case in the labor field based upon the failure to exhaust contractual remedies. A writ of certiorari is clearly not warranted in these circumstances.

Mr. Chief Justice Taft has stated the matter in the proper light, when he said, " ... it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 67 L.Ed. 712, 43 S.Ct. 422.

Based upon the foregoing, the petition for a writ of certiorari should be dismissed.

Respectfully submitted,

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Post Office Drawer 3008
Monroe, Louisiana 71210

By: A. Richard Gear
A. Richard Gear
Attorneys for Respondent,
SUN PIPE LINE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that I have caused three copies of this Brief to be served by first class mail upon Petitioner's counsel of record at his office address set forth below:

Paul Henry Kidd
KIDD & KIDD
233 South Grand Street
P. O. Drawer 3168
Monroe, Louisiana 71210

A. Richard Gear, jr.

A. Richard Gear

APPENDIX

APPENDIX A

A-1

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

NUMBER 83-1415

HENRY G. HERFORD

VERSUS

SUN PIPE LINE COMPANY

The deposition on oral examination of Henry G. Herford, Plaintiff, taken in the offices of Hudson, Potts & Bernstein, 10th Floor, Ouachita National Bank Building, Monroe, Louisiana, at 9:10 A. M. on the 23rd day of February, 1984, before Betty P. Toms, a notary public in and for the Parish of Ouachita, State of Louisiana, in association with Betty P. Toms & Associates Court Reporting, with the witness being sworn by Betty P. Toms.

* * * * * *

* * * * *

YOUR SUPERVISOR AND MR. BAKER CAME IN?

A. YES, SIR, HE HAD A STROKE.

Q OH, I SEE.

A AND THEN MR. BAKER TOOK HIS PLACE.

Q AND THAT'S E. A. BAKER; IS THAT RIGHT?

A UH-HUH (YES).

Q DO YOU REMEMBER WHEN MR. BAKER TOOK OVER, WHAT YEAR THAT WAS?

A NO, SIR, I DON'T REALLY. I CAN'T REMEMBER.

Q HE WAS YOUR SUPERVISOR FOR TWO TO FOUR YEARS, THOUGH?

A YES, SIR.

Q HOW LONG HAVE YOU WORKED FOR SUN PIPE LINE COMPANY?

A THIRTY-SEVEN YEARS.

Q WHAT DATE DID YOU START WITH THEM?

A JUNE THE 6TH OF 1946.

Q AND YOU WERE A MEMBER OF THE SUN PIPE LINE EMPLOYEES' ASSOCIATION?

A YES, SIR.

Q WHEN DID YOU FIRST BECOME A MEMBER OF THE ASSOCIATION?

A WITHIN A YEAR AFTER - - YOU HAD TO BE WITH THE COMPANY A YEAR BEFORE YOU COULD.

Q AND YOU REMAINED A MEMBER UNTIL SOMETIME AFTER YOUR DISCHARGE?

A YES, SIR, AND I WAS ALSO A REPRESENTATIVE ONE - -

Q HOW LONG WERE YOU A REPRESENTATIVE?

A TWO YEARS

Q WHERE? IN DELHI?

A AT LONGVIEW.

Q LONGVIEW. WHAT YEARS WERE THOSE, PLEASE, SIR?

A LET'S SEE; MUST'VE BEEN '74 AND '75 I GUESS. APPROXIMATELY IN THAT - - AROUND '75 SOMETIME. I DON'T KNOW EXACTLY.

Q AND YOU WERE AWARE THAT THERE WAS AN AGREEMENT BETWEEN THE ASSOCIATION AND THE COMPANY?

A I WAS.

Q YOU HAVE SEEN THE MOST RECENT AGREEMENT, THAT FEBRUARY 1, 1982 TO 1984 AGREEMENT, HAVEN'T YOU?

A YES, SIR, I HAVE SEEN IT, YES.

Q LET'S PICK UP TOWARD THE POINT THAT YOU WERE DISCHARGED. WHEN DID YOU FIRST LEARN THAT THERE WAS AN INVESTIGATION THAT WAS GOING ON?

A OCTOBER THE 14TH, THE DAY I WAS DISCHARGED.

Q WELL, WERE YOU CONTACTED PRIOR TO THAT DATE - -

A NO, SIR.

Q - - ABOUT AN INVESTIGATION OR A PROBLEM OR - -

A NO. NOW, I WAS HAVING PROBLEMS WITH SUN OIL BUT NOT ANYTHING LIKE I WAS DISCHARGED ON.

Q BUT YOU WERE NOT AWARE BEFORE OCTOBER 14 THAT THERE WAS A SECURITY INVESTIGATION OF SOME ASPECTS OF YOUR

* * * * *

APPENDIX B

* * * * *

A YEAH, THAT'S RIGHT.

Q AND DO YOU RECALL MR. FACE ADVISING YOU THAT YOU COULD FILE A GRIEVANCE ON THIS?

A YES, I DID.

Q OKAY. BUT AT THAT TIME YOU THOUGHT THAT IT WOULD BE BETTER TO GO AHEAD AND SUE IN COURT RATHER THAN FILING A GRIEVANCE?

A NO, SIR, I - -

MR. KIDD: YOU'RE ARGUING, COUNSELOR.

MR. GEAR: I'M JUST ASKING QUESTIONS, TRYING TO FIND OUT WHAT (INAUDIBLE) - -

MR. KIDD: UNLESS YOU CAN EXPLAIN TO HIM IN TERMS THAT WILL CLEARLY INDICATE THE PROCEDURE THAT HE SHOULD HAVE RECOGNIZED THAT SHOULD HAVE BEEN FOLLOWED THAT'S IN THAT BOOK, THEN IT CONSTITUTES ARGUMENT AND YOU HAVEN'T LAID THE FOUNDATION TO SHOW

THAT HE'S COMPETENT ENOUGH TO - -

MR. GEAR: I DON'T NEED TO LAY A FOUNDATION IN A DEPOSITION. I'M JUST TRYING TO FIND OUT WHAT HE KNOWS.

Q YOU DIDN'T FILE A GRIEVANCE?

MR. KIDD; WE'LL STIPULATE TO THAT. HOW ABOUT THAT?

MR. GEAR: OKAY.

* * * * *

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION NO. CV83-1415M

HENRY G. HERFORD
versus
SUN PIPE LINE COMPANY

RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Petitioner HENRY G. HERFORD, through the undersigned counsel, respectfully responds to defendant's Motion For Summary Judgment as follows:

I.

Petitioner has made a good faith effort to exhaust all internal grievance procedures available to him.

II.

Petitioner was induced to believe that his grievance of November 2, 1982, was under serious consideration by his former employer.

III.

Petitioner filed his suit in connection with the violation of Section 301 of the National Labor Relations Act within six months of the injury suffered.

IV.

That portion of petitioner's Complaint which sets forth a claim for the intentional infliction of emotional distress is not preempted by federal labor law.

V.

Petitioner is able to show factual disputes which clearly indicate that substantial issues of material fact exist.

VI.

Defendant's Motion for Summary Judgment should be denied.

VII.

Wherefore, petitioner HENRY G. HERFORD, through the undersigned counsel, prays that defendant's Motion for Summary Judgment be denied.

Respectfully submitted,

PAUL HENRY KIDD
Kidd & Kidd
No. 1 Wood Street
P. O. Box 3168
Monroe, Louisiana 71201

CERTIFICATE

I hereby certify that I have furnished an exact copy of the foregoing Response and Opposition to Defendant's Motion for Summary Judgment to Hon. A Richard Gear, Hudson, Potts, and Bernstein, P. O. Drawer 3008, Monroe, La. 71210, by placing same in the U. S. Mail, postage prepaid, on this _____ day of September, 1984.

_____

OF COUNSEL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION NO. CV83-1415M

HENRY G. HERFORD
versus
SUN PIPE LINE COMPANY

MEMORANDUM IN SUPPORT OF RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Introduction

On August 13, 1984, this Court conducted a chambers conference regarding the various questions presented by defendant's Motion for Summary Judgment. Due to confusion regarding the sequence of events surrounding discovery procedures and the complexity of the legal questions presented, this Court allowed the parties an additional thirty (30) days within which to complete discovery and file necessary briefs. This Memorandum is filed in conformity with the August 13, 1984, order of this Honorable Court.

Factual Statement

On October 13, 1982, petitioner, an employee of Sun Pipe Line Company for approximately thirty-seven (37) years, received a message from company officials to be present at a meeting to be conducted in Monroe, Louisiana, the following day. Petitioner immediately contacted Mr. Hank Face, his Union representative, who was unaware of the exact nature of the meeting. Pursuant to the orders of company officials, petitioner met with Sun representatives on the morning of October 14, 1982. The Union representative,

who had flown to Monroe, Louisiana, from Longview, Texas, in order to be available to petitioner for the meeting, was not present at the meeting and did not consult with petitioner at any time prior to or during the meeting.

Following a brief interrogation by company investigators, petitioner was notified of the termination of his employment with Sun Pipe Line Company on the same day, for allegedly violating Company policy. Petitioner was not made aware of the particular grounds for his termination by either Sun officials or his Union representative.

Subsequent to the October 14, 1982, meeting there was no discussion between petitioner and his Union representative concerning the exhaustion of administrative grievances as provided by the Collective Bargaining Contract. At this time petitioner was under the impression that the general policy of his Union was to avoid all potential conflicts with management by assuming a very limited role in the employee grievance process. Petitioner's conclusion was based upon the fact that during the course of his lengthy employment, he had no independent recollection of any Sun employee filing a grievance against the Company through the Union representative. For this reason petitioner concluded that it would be futile to reply upon Union representation and felt compelled to retain legal counsel.

Petitioner worked to and through October 16, 1982, which was designated as his separation date. On the afternoon of October 16, 1982, petitioner contacted the undersigned counsel in connection with the pursuit of all available remedies against his former employer. On the same date, petitioner contacted the Louisiana State Employment Security Office for the purpose of requesting unemployment compensation and ascertaining the reasons for his termination. Petitioner then requested a copy of his employment contract from his Union representative for the purpose of

pursuing all available administrative and judicial remedies. The requested information was not supplied to petitioner or his counsel for approximately six or eight days.

It was not until November 1, 1982, that petitioner was informed by the Louisiana State Employment Security Office that the action of Sun had been based upon aggravated misconduct in the form of alleged incidents of theft and dishonesty concerning the misappropriation of Company property and labor. On November 2, 1982, petitioner, through the undersigned counsel, contacted Sun Pipe Line Company through Mr. Wendall A. Holloway, its Southwest Area Manager, in an attempt to pursue all available administrative remedies. On this occasion petitioner informed Sun that his termination had represented nothing more than a form of harassment and retaliation directed against him in response to his official complaints regarding the Company's violation of state and federal laws governing the production of oil. On November 11, 1982, petitioner's communication was referred to Mr. J. A. Ladner, Sun's Chief Legal Counsel. At no time subsequent to his November 2, 1982, communication did Sun, through any of its employees or representatives, notify petitioner that his Complaint had been denied on the merits or denied as untimely filed.

An administrative hearing was conducted by the Louisiana State Employment Security Office on January 27, 1983, with regard to petitioner's application for unemployment compensation. On March 7, 1983, the Louisiana State Employment Security Office determined petitioner to be fully eligible for unemployment compensation due to the failure of Sun to prove that he had been discharged for misconduct in connection with his employment. Despite these findings, Sun officials took no action concerning petitioner's pending Complaint.

On April 28, 1983, petitioner filed suit in the Fifth Judicial District Court alleging retaliatory discharge and the breach of contract. Petitioner's State Court pleading merely alleged that the Company had breached the terms of the contract by terminating him without just cause, and did not specifically allege a violation of the Collective Bargaining Agreement. Subsequent to the petition of the defendant seeking removal, the cause was removed to this Court on the basis of federal diversity and the authority of the Labor Management Relations Act; 29 U. S. C. §185. Following a denial of Petitioner's Motion to remand the cause to the Fifth Judicial District Court, the original Complaint was amended to further allege the violation of a Collective Bargaining Agreement, defamation, and the violation of civil rights.

This memorandum is offered in support of petitioner's response and opposition to the Motion for Summary Judgment filed by the defendant.

ARGUMENT

Defendant primarily contends that petitioner failed to timely exhaust the internal grievance procedures available to him under Article VI of the Collective Bargaining Agreement, thus precluding the subsequent judicial review of those claims arising from the termination of his employment. This contention is grounded upon the notion of non-exhaustion of available administrative remedies. The alternative contention of defendants, which is based upon the concept of prescription, suggests that the failure of petitioner to file a Complaint in this Court within six months of the date of his termination in connection with the violation of the Collective Bargaining Agreement precludes judicial review under the National Labor Relations Act.[1] With regard to

1 Defendant's alternative contention suggests, or at least anticipates, that any failure to exhaust internal grievance procedures was due to the absence of "fair representation" on the part of the Union.

each of these contentions, defendant urges that the applicable provisions of Section 301 of the National Labor Relations Act preempt any and all State remedies otherwise available to petitioner as a result of a retaliatory discharge and the intentional infliction of emotional distress. As such, defendant suggests that it is entitled to a summary judgment as a matter of law.

For the sake of clarity and emphasis, each of these complex propositions is addressed separately.

A. *The Exhaustion of Remedies*

Article VI of the Collective Bargaining Agreement applicable to the employees of Sun Pipe Line Company provides for a five-step grievance procedure which must be initiated within fifteen (15) days ". . . after the occurrence of the incident complained of, or after its occurrence becomes *known to the employee* or employees concerned." (emphasis added). It is worth noting that Subsection 2 of Article VI indicates that the grievance procedure is "strictly limited to disputes arising over the interpretation of this Agreement."

In the first instance, it should be noted that petitioner's claim in no way involves a dispute which arises from the interpretation of any term or condition of the Collective Bargaining Agreement. Petitioner's claim simply involves conduct on the part of the defendant which is outrageous and contrary to public policy. As such, it is unlikely that the questioned complaint is susceptible to the ordinary grievance process. In any event, the facts of the instant case show that petitioner attempted to exhaust all available administrative remedies, to no avail.

An individual employee may bring a suit against his employer pursuant to Section 301 of the National Labor Man-

agement Relations Act in connection with an unfair labor practice which is deemed to violate a Collective Bargaining Agreement. *Smith v. Evening News Association*, 371 U.S. 195, 83 S.Ct. 267, (1962). Prior to resorting to such judicial remedies, the aggrieved employee is ordinarily required "to *attempt* to exhaust any grievance or arbitration remedies provided in the Collective Bargaining Agreement." See, *Del Costello v. International Brotherhood of Teamsters*, _____ U.S. _____, 103 S.Ct. 2281, (1983), citing, *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, (1965), (emphasis added).

It should be observed that the application of the *Maddox* rule does not create an inflexible or airtight procedural default mechanism which serves to automatically bar all employee complaints filed under such circumstances. As will be more fully discussed in Section "B" of this argument, an exception to the general rule of exhaustion is recognized when the contractual mechanism has been seriously impaired and flawed by the Union's breach of duty of fair and adequate representation. *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, (1967). As such, enforcement of the so-called "finality provision" is conditioned upon the employee's Union having fully satisfied its statutory duty of fair representation of all employees in connection with arbitration proceedings. *Hines v. Anchor Motor Freight*, 424 U.S. 554, 96 S.Ct. 1048, (1976). For the purposes of this portion of the argument, it is sufficient to point out that an aggrieved employee may be relieved of the duty to comply with exhaustion requirements when he is simply able to show that "he *attempted* to utilize the contractual procedures for settling his dispute with his employer . . ." Id. 424 U.S. at 563, (emphasis added). Without specifically asserting the question of "fair representation" at this stage of the argument, petitioner is able to show that contractual grievance procedures were fully exhausted by his good faith effort to utilize all channels available for the resolution of his dispute with his employer.

Assuming the existence of a valid and binding collective bargaining instrument, it is urged that petitioner in the instant case made a diligent and good faith effort to substantially comply with the terms and conditions of the grievance procedure available to him. At the outset, it must be reiterated that the language of the contract drafted by the employer provides that the fifteen (15) day prescriptive period begins to toll when the facts giving rise to the grievance become "known to the employee." The crux of petitioner's contention is simply that he was not made aware of the grounds of the Company's action at the time of his termination.

The vague and conclusory allegation that petitioner had violated a Company Policy did not serve to adequately notify him of the essential facts serving as the formal basis of the charge and thereby commence the tolling of the fifteen (15) day period. Petitioner in the instant case obtained the assistance of legal counsel within two days of his termination and immediately requested a copy of his contract in order to enable counsel to effectively process a grievance on his behalf. Whatever delay resulted in filing the grievance, it is apparent that such delay was attributable to the employer. Petitioner was not fully and adequately advised of the specific nature of the allegations supporting his dischare until November 1, 1982, at which time he was furnished such information by the Louisiana State Employment Security Office in response to his application for unemployment compensation. From this fact it is readily apparent that petitioner availed himself or whatever collective bargaining remedies which might have been available to him within twenty-four (24) hours of receiving notice of the particular facts giving rise to the incident. It is extremely relevant to note that subsequent to the November 2, 1982, communication, no agent or representative of Sun informed petitioner or the undersigned counsel that his

request had been denied. Instead, representatives of Sun continued to discuss the possibility of an amicable settlement with petitioner, through the undersigned counsel, for several months.

Louisiana jurisprudence recognizes certain limited exceptions to the statutorily created prescriptive periods governing various causes of action. Such an exception is applicable when the plaintiff is unable to exercise his cause of action at the time it accrues. *Trainer v. Aycock Welding Co.*, 421 So.2d 416, 418, (La.App.1 Cir. 1982). In the instant diversity case the Louisiana jurisprudence governing prescription and the exceptions to the general rules of prescription is binding upon this Court. *Sprinkle v. Farm Bureau Insurance Companies*, 492 F.2d 469, 471, (5th Cir. 1974). The ancient civil doctrine of *contra non valentem agere nulla curril praescriptio* recognizes that no prescription runs against a person unable to bring an action. *Brown v. State, through Dept. of Corrections*, 354 So.2d 633, 635, (La.App.1 Cir. 1978). Four judicially recognized situations in which the principle of *contra non valentem* may be applied include:

> "Where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2). where there was some condition coupled with the contract as connected with the proceedings which prevented the [plaintiff] from suing or acting; (3). where the [defendant] himself has done some act effectively to prevent the [plaintiff] from availing himself of his cause of action; and (4). where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant."

See, *Corsey v. State, through Dept. of Corrections*, 375 So.2d 1319, 1321-1322, (La. 1979). It is urged that the basic principles governing prescriptive requirements are equally applicable to those cases in which a party has been prevented from exhausting certain remedies which are a necessary prerequisite to litigation.[2]

In the instant case the failure of Sun to immediately disclose the actual reason for petitioner's termination prevented him from timely exhausting those remedies supposedly available under the Collective Bargaining Agreement. As well, the action of Sun, which induced petitioner and the undersigned counsel to believe that the communication of November 2, 1982, was being considered, prevented petitioner from resorting to judicial remedies under Section 301 of the National Labor Relations Act, and further serves to estop defendant from now asserting a technical noncompliance with contractual remedies. For this reason, petitioner's communication of November 2, 1982, should be deemed as adequate compliance with contractual remedies so as to avoid summary dismissal of this action. Moreover, as is fully discussed in Section "B" of this argument, the action of the sun should be viewed so as to interrupt the six month prescriptive period for filing of this Complaint under Section 301 of the National Labor Relations Act.

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2 In addition to preventing petitioner from promptly filing a grievance within the fifteen (15) day period, the nondisclosure of certain facts by Sun additionally prevented petitioner from filing a suit against his employer for the breach of a Collective Bargaining Contract and his Union for a breach of their duty of fair representation within the six month prescriptive period. Had the defendant not lulled petitioner into inaction by ostensibly considering his November 2, 1982, letter as a grievance, petitioner would have filed a suit against his employer and his Union within the Month of November of 1982.

The factual allegations contained within the attached affidavit clearly reflect a substantial factual dispute surrounding the circumstances upon which petitioner first became aware of the grounds of his discharge. This information, standing alone, is sufficient to compel the denial of the Motion for Summary Judgment. See, *Baldini v. Local No. 1095, Intern. U., etc.*, 581 F.2d 145, (7th Cir. 1978).

B. *The Absence of Fair Representation*

As previously noted, the rigid enforcement of the so-called "finality provision" with regard to the exhaustion of collective bargaining remedies is contingent upon the employee's Union performing its statutory duty of fair representation of all employees as their collective bargaining representative. In *Vaca v. Sipes*, supra, the United States Supreme Court acknowledged that a suit alleging wrongful discharge in violation of a Collective Bargaining Agreement was not barred or preempted when the Union had arbitrarily, and without cause, failed to arbitrate the grievance. In *Hines v. Anchor Motor Freight, Inc.*, supra, the Court reiterated the rule of *Vaca* under circumstances in which the Union had failed to adequately discharge its affirmative duty of fair representation by investigating easily discoverable evidence which would have completely undermined allegations of employee dishonesty. *Hines* clearly stands for the proposition that a wrongfully discharged employee should not be left without a job and a remedy when the Union has failed to perform its duty of fair representation in connection with arbitration proceedings. A Union may not arbitrarily ignore a meritorious grievance, or process a grievance in a perfunctory manner without subverting the essence of the arbitration process. *Margetta v. Pam Pam Corp.*, 501 F.2d 179, 180, (9th Cir. 1974). The investigation of the questioned facts leading to the termination of petitioner was so inept and careless as to be considered a *per se* breach of the duty of fair representation. See, *DelCostello*

v. International Brotherhood of Teamsters, supra, 103 S.Ct. at 2286. Under the factual circumstances presented by the instant case, it was incumbent upon the Union to at least attempt to investigate readily available sources of information which vindicated a thirty-seven year employee.

Once petitioner resorts to the absence of fair representation in order to avoid the preclusion of his claim due to noncompliance with collective bargaining remedies, his Complaint is classified as a "hybrid" action; that is, one involving both the breach of a Collective Bargaining Agreement and the breach of duty of fair representation. *Farr v. H. K. Porter Co., Inc.*, 727 F.2d 502, 505, (5th Cir. 1982). Obviously, a finding that petitioner complied with available collective bargaining grievance procedures will obviate the necessity of formally classifying this Complaint for the purpose of consideration under the *Vaca* and *Hines* line of cases.

Assuming, for the sake of this argument alone, that collective bargaining grievance procedures were not adequately exhausted, the failure to exhaust such internal remedies against the employer does not preclude the filing of a "hybrid" action against the employer, the Union, or both. Such a "hybrid" action is governed by the six month period of limitation set forth by Section 10(b) of the National Labor Relations Act, *29 U.S.C. § 160 (B)*. See, *Delcostello v. International Brotherhood of Teamsters*, supra, 103 S.Ct. at 2285, (the six month limitation period provided by the National Labor Relations Act for the filing of unfair labor practices charges is the same statute of limitations applicable to an employee action against the employer and the Union for the breach of a Collective Bargaining Agreement and violation of the duty of fair representation, in

that such action has no close analogy in state law.)[3] However, the retrospective application of the *DelCostello* rule to the facts of the instant case does not automatically bar consideration of the claim due to the failure of petitioner to file the Complaint within six months of the date fo his termination.

In order to determine the actual date upon which the six month period prescribed by Section 10(b) of the National Labor Relations Act commenced, the Courts must look to the date when the plaintiff was, or reasonably should have been, aware of the injury. *Farr v. H. K. Porter Co., Inc.*, supra, 727 F.2d at 505, citing, *Benson v. General Motors Corp.*, 716 F.2d 862, 864, (11th Cir. 1983). As noted in Section "A" of this argument, petitioner was not adequately informed of the operative facts giving rise to his termination until November 1, 1982, eighteen days following the formal notice of his termination. The inexcusable failure of the employer to promptly disclose those basic facts which would have immediately informed petitioner of his cause of action, as well as that conduct which lulled petitioner into inaction based upon the mistaken impression that a grievance or administrative complaint was under serious consideration, effectively served to interrupt the six month prescriptive period. *Corsey v. State*,

---

3 By comparison, those suits which are based upon a "straight breach of contract," and do not allege a violation of the duty of fair representation, are governed by the applicable State law governing prescription. See, *International Union of Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S.Ct. 1107, (1966), and *Farr v. H. K. Porter Co., Inc.*, supra, 727 F.2d at 505. Petitioner might well suggest, in the alternative to a "hybrid" action, that he has filed a "straight breach of contract" suit in connection with the employer's decision to terminate him without just cause. Such an action might be brought in this Court since the language of the Collective Bargaining Agreement appears to limit the grievance process to those disputes "arising over the interpretation of [the Collective Bargaining] Agreement."

through Dept. of Corrections, supra. The notion that a prescriptive period may be interrupted by the action of a defendant which prevents the plaintiff from asserting a cause of action is not limited to the Louisiana jurisprudence. In *DelCostello v. International Brotherhood of Teamsters*, supra, 103 S.Ct. at 2294, the United States Supreme Court specifically noted the possibility that certain events might have served to interrupt the tolling of the six month prescriptive period. In this regard the contention of petitioner is in no way inconsistent with the latest pronouncement of the United States Supreme Court in *DelCostello*, a case extensively cited and relied upon by Sun.

Moreover, it should not be forgotten that a large portion of petitioner's cause of action is based upon state tort law. That portion of petitioner's Complaint which alleges the intentional infliction of extreme emotional distress is founded upon the false accusations of theft and dishonesty in connection with the misappropriation of Company property and labor. Considering such, the allegation of theft and dishonesty, which first became known to petitioner on November 1, 1982, constituted the actual injury complained of rather than the earlier discharge.

C. *Preemption of State Remedies*

Defendant urges that petitioner's state tort claim is preempted by Sections 7 and 8 of the National Labor Relations Act, which supposedly grant an exclusive application of federal law to those claims involving unfair labor practices and the breach of a Collective Bargaining Agreement.

Pursuant to the doctrine of preemption, the states are precluded from exercising power over a particular area of activity which threatens to interfere with the federal policy of industrial relations. *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 77 S.Ct. 598, (1957). This concept does not

preclude the states from exercising their power to regulate that activity which may be perceived as a peripheral concern of the Labor Management Relations Act. *San Diego Building Trades Council, etc., v. Garmon*, 359 U.S. 245, 79 S.Ct. 773, 779, (1959). The United States Supreme Court has refused to apply the preemption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, (1971). In *Farmer v. Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, (1977), the United States Supreme Court determined that the National Labor Relations Act did not preempt a state tort action for intentional infliction of emotional distress arising in connection with alleged employment discrimination, since there is no federal protection for conduct which is so outrageous "that no reasonable man in a civilized society should be expected to endure it." 430 U.S. at 302. Under such circumstances the potential for state interference in the federal policy of industrial relations is insufficient to counterbalance the legitimate and substantial interest of the state in protecting its citizens. 430 U.S. at 304.

Pursuant to the *Farmer* decision, petitioner's tort claim is not preempted by federal law. As such, it appears that recent panel opinions of the Fifth Circuit relied upon by the defendant are inconsistent with the rule of law established by the United States Supreme Court in the *Farmer* decision. Compare, *Ramsey v. Signal Delivery Service, Inc.*, 631 F.2d 1210, (5th Cir. 1980), and, *Mobile Mechanical Contractors Association v. Carlough*, 664 F.2d 481, (5th Cir. 1981).

D. *The Applicability of Summary Judgment*

Rule 56 of the Federal Rules of Civil Procedure allows the issuance of a summary judgment if the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits, show the absence of a genuine issue as to materal fact, and suggest that the moving party is entitled to a summary judgment as a matter of law. The issuance of a summary judgment is appropriate only when the total facts, viewed in the light most favorable to the nonmoving party, clearly indicate the absence of a genuine issue as to material fact.

The summary judgment process is not generally favored in cases involving complex factual issues and extensive factual determinations. *Cronin v. Midwestern Okl. Dev. Corp.*, 619 F.2d 856, (10th Cir. 1980), and, *Solinger v. A. & M. Records, Inc.*, 586 F.2d 1304, (9th Cir. 1978). As is evident from the attached affidavit, a substantial factual dispute exists concerning the date and circumstances upon which petitioner first became aware of the factual allegations leading to his termination, and the conduct of Sun which encouraged petitioner to believe that his grievance was being seriously considered. As well, there exists a factual controversy as to whether the Union breached its duty of fair representation by failing to investigate certain evidence and assist petitioner in the internal grievance process. Such factual disputes suggest that the instant case is not amenable to summary judgment. *Baldini v. Local Union 1095, Intern. U., etc.*, supra, 581 F.2d at 149-151.

Conclusion

For the aforementioned reasons, petitioner HENRY G. HERFORD respectfully requests that the Motion for Summary Judgment filed by the defendant be denied.

Respectfully submitted,

PAUL HENRY KIDD
Kidd & Kidd
No. 1 Wood Street
P. O. Box 3168
Monroe, Louisiana 71201
COUNSEL FOR PETITIONER

CERTIFICATE

I hereby certify that I have furnished an exact copy of the foregoing Memorandum in Support of Response and Opposition to Defendant's Motion for Summary Judgment to Hon. A. Richard Gear, Hudson, Potts, and Bernstein, P.O. Drawer 3008, Monroe, LA 71210, by placing same in the U.S. Mail, postage prepaid, on this _____ day of September, 1984.

_____

OF COUNSEL

STATE OF LOUISIANA

PARISH OF OUACHITA

BEFORE ME, the undersigned authority, personally came HENRY G. HERFORD, who first being duly sworn, deposed:

On October 13, 1982, my wife received a telephone call around 5:00 P.M. from Sun Pipeline officials directing me to appear at the Holiday Inn in Monroe the next day. When I came in, my wife gave me the message, and I immediately called Hank Face, the Union representative in Longview, Texas, to ascertain what the meeting was all about. Mr. Face told me that he didn't know but that he had been asked by Sun Pipeline officials to fly to Monroe the next day. Mr. Face did not mention the grievance procedure to me.

There was a very good reason for Mr. Face not to mention the grievance procedure to me. I had been a Union representative some years before and I understood Sun Pipeline's policy toward anyone filing a grievance against it. If an employee filed a grievance against Sun Pipeline, he would be fired. It was as simple as that. In all of my 37 years with Sun Pipeline I have no personal recollection of any employee filing a grievance against the Company. The only grievance connected with Sun Pipeline Company of which I am aware is a grievance filed by Sun Production employees against me, and I don't know if it was ever reduced to writing. Filing a written grievance against Sun Pipeline Company was just one of those things employees understood that one did not do if he wanted to keep his job.

Of course, after I was discharged, Sun Pipeline could not fire me again. However, I knew Hank Face would not file a grievance in my behalf, because, more than likely, Sun

Pipeline would have fired him. In any event, I knew that I had to retain a lawyer to file my grievance if it became necessary. As a matter of fact, I had earlier requested Mr. Raymond Vallery of Sun Pipeline to hire me a lawyer to represent me in the dispute with Sun Production employees.

The next morning, October 14, I drove from my home in Franklin Parish to Monroe, a distance of about 40 miles, to meet with Sun Pipeline officials, who were flying in from Longview, Texas. I should note that I worked in Delhi, Louisiana, and that there was no Sun Pipeline official who worked there to supervise my work. Mr. Ed Baker was my immediate supervisor; his office was in Longview, Texas.

When I arrived at the Holiday Inn in Monroe, my immediate supervisor, Ed Baker, nor his immediate supervisor, Marvin Collins, was present. I was met by Sun Pipeline official Wendell Holloway and, perhaps, Larry Collins. In any event, I was aware Mr. Larry Collins was present at the Holiday Inn. Mr. Holloway said nothing - except to exchange pleasantries. Neither Mr. Holloway nor Mr. Collins advised me that Hank Face was at the airport nor that he could be made available to meet with me. Mr. Holloway directed me to go into a room where two investigators were present and the only thing he said to me was: "Answer their questions."

The investigators questioned me at length about various allegations involving my employment with Sun Pipeline. I told then that all of what they were asking me about was nothing more than a camouflage for my reporting the overproduction of oil and various illegalities involving employees of Sun Production Company and there had been an ongoing dispute about this for several years. One investigator then left the room and came back a short while later and said, "He's right." The interview ended. Mr. Holloway then gave

me my letter of termination without saying anything about why I was being terminated. Neither did Mr. Holloway say anything about Mr. Face being available.

I was then escorted back to my office to clean out my personal belongings. Because no one knew how to fill out work papers normally handled by me, I was asked to assist and did assist in filling out the papers. The next day, I went back to the office and assisted in completing the paperwork that needed to be done. The last day on which I performed work was Saturday, October 16, 1982. (My final payroll stub includes pay for my work on Saturday, October 16, 1982.) Attached hereto is a copy of my last payroll stubb, Exhibit 1.

On the following Wednesday, October 20, I met with my attorney Paul Kidd and told him that I had been fired on October 14 for violating "company policy." He asked me what "company policy" was violated and I told him that I didn't know. He further asked me if I had a copy of the company contract, and I told him that I didn't but that I could get one. He instructed me to get one. He asked me did I suspect the reason that I had been fired and I told him I suspected that it was because of the ongoing squabble I was having with Sun Production employees. I also told him that Mr. Holloway refused to tell me about why I was being fired.

Mr. Kidd then instructed me to go to the Louisiana State Employment Office to sign up for unemployment benefits. He told me the purpose for doing so was to determine the reasons for my discharge. I went that same day and signed up for unemployment benefits.

I had also told Mr. Kidd that I wanted him to handle my discharge, because I knew the Union representative would not handle this matter for me. Mr. Kidd told me to get a

copy of the Union contract and get back with him.

I attempted to get a copy of the Union contract locally but could not find one. I then called Hank Face to send me a copy of the Union contract and he agreed to do so. Mr. Face did not ask me if I wanted to file a grievance nor did he volunteer to file a grievance for me.

Mr. Face did not send me a copy of the Union contract right away. I would guess I received it some six to eight days later. I know that I received a copy of the Union contract from Mr. Face about the same time I learned that Sun Pipeline was opposing my unemployment benefits. I went to the Louisiana State Employment Office on November 1, 1982, and learned for the first time that Sun Pipeline claimed that I was terminated for alleged "dishonesty." I then went directly to Mr. Kidd's office and gave him the information I had learned from the Louisiana State Employment Office and gave him a copy of the Union contract.

I instructed Mr. Kidd to make a complaint with Sun Pipeline about my discharge because I knew the Union would not prosecute my grievance. Mr. Kidd wrote Sun Pipeline Company in my behalf on November 2, 1982. See attached Exhibit 2. In that letter Mr. Kidd specifically advised Sun Pipeline of my grievance:

> "Finally, it should be pointed out that Mr. Herford's discharge violates Article XXVI of the agreement between your company and the association dated February 1, 1982."

I acted as soon as practically possible, under the circumstances, i.e. geography, logistics, and the past history of the Association's failure to file grievances, to make absolutely

sure that my grievance was processed.

On November 11, 1982, my attorney received a letter from Sun Pipeline's chief legal counsel indicating my grievance was being processed. See attached Exhibit 3.

On November 19, 1982, my attorney had a long telephone conversation with Sun Pipeline's chief legal counsel discussing my grievance and advised Mr. Kidd that he would like to meet with Mr. Kidd and me to discuss my grievance. However, because of Mr. Ladner's and Mr. Kidd's previous commitments, a meeting could not be held until after the first of the year. See attached Exhibit 4.

Mr. Kidd and Mr. Ladner met on February 14, 1983, in Longview, Texas, to discuss my grievance. I was available in Longview, Texas, on that date but was not called into the meeting.

On February 24, 1983, Mr. Ladner sent Mr. Kidd certain data concerning my grievance. See attached Exhibit 5.

The only other correspondence that I received from Sun Pipeline Company after October 14, 1982, was a letter from Larry D. Collins wherein it was acknowledged that I was entitled to another extra day's pay, i.e. through October 17, 1982. See attached Exhibit 6.

I received no communication from Sun Pipeline after Mr. Ladner's February 14, 1983, letter to Mr. Kidd. Consequently, I was never advised that my November 2, 1982, grievance had ever been denied nor was I ever advised that my grievance was untimely.

On January 27, 1983, a hearing was had on my application to the Louisiana State Employment Office for un-

employment benefits. On March 7, 1983, the Louisiana State Employment Office ruled for me on my application for unemployment benefits. See attached Exhibit 7. Shortly thereafter, I went to Longview, Texas, and showed Hank Face a copy of Exhibit 7. Mr. Face said he hoped that I won but he made no offer to assist me.

s/s Henry G. Herford
HENRY G. HERFORD

SWORN TO AND SUBSCRIBED before me this 14 day of August, 1984.

s/s Jana L. Witty
NOTARY PUBLIC

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NUMBER 84-4660

Filed Janurary 11, 1985

HENRY G. HERFORD,
Plaintiff-Appellant

versus

SUN PIPE LINE COMPANY,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
LOUISIANA, CIVIL ACTION NUMBER CV83-1415M

ORIGINAL BRIEF ON BEHALF OF
PLAINTIFF-APPELLANT HENRY G. HERFORD

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that Judges of this Court may evaluate possible disqualification or recusal.

Sun Company, Inc.
Sun Exploration and Production Company
Sun Refining and Marketing Company
Sun Tech., Inc.
Sun Pipe Line Company
Sun Oil Trading Company
Sunoco Energy Development Company
Radner Corporations
Sun Carriers, Inc.
Sun Distributors, Inc.
Mr. Henry G. Herford

PAUL HENRY KIDD

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 13.6.4 of the local rules of this Court, plaintiff-appellant requests oral argument of this appeal.

The resolution of the appeal will determine whether a thirty-seven year employee will be condemned to forfeit significant economic rights without so much as an opportunity to present his version of the incident to an impartial factfinder. Moreover, this appeal presents an important question of law concerning the proper standard for evaluating the labor union's duty of fair representation in such cases.

Because the opinion of the District Court did not seriously consider the factual and legal issues presented by appellant, it is urged that oral argument is appropriate. In view of the substantial interest at stake and the important factual and legal questions raised by this appeal, plaintiff-appellant respectfully requests this Honorable Court to allow oral argument in this case.

STATEMENT OF JURISDICTION

On September 17, 1984, the United States District Court for the Western District of Louisiana issued an order granting defendant's Motion for Summary Judgment. R. 197. On October 3, 1984, the same Court issued an order which affirmed its earlier ruling and dismissed plaintiff-appellant's complaint at his cost. R. 245.

Plaintiff-appellant invokes the appellate jurisdiction of this Honorable Court pursuant to *28 U.S.C. §1291*, which provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NUMBER 84-4660

HENRY G. HERFORD,
Plaintiff-Appellant

versus

SUN PIPE LINE COMPANY,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF LOUISIANA

ORIGINAL BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

ISSUES PRESENTED

(1) Whether the delay provided for the filing of internal grievances established by a Collective Bargaining Agreement, as well as the delay for the filing of a Section 301 - - duty of fair representation suit, may be interrupted by:

(a) The failure of the employer to furnish specific notice of the grounds for termination; and

(b) The action of the employer and its legal representative which leads the employee into misapprehension and inaction concerning the status of his grievance?

(2) Whether a labor organization's negligent breach of its duty of fair representation, falling short of intentional and malicious conduct, may nonetheless serve as the basis for an award of compensatory damages?

(3) Whether the concept of preemption serves to absolutely preclude State Court consideration of claims arising from a labor organization's breach of duty of fair representation, and claims involving a violation of state tort law arising from conduct which is contrary to sound public policy?

(4) Whether summary judgment is appropriate when serious factual disagreement exists as to whether the employee was immediately advised of the actual reasons for his termination - - whether the employee was informed of his right to process a grievance with the assistance of union representation - - and whether the employee intelligently waived his right to participate in such grievance procedures?

(5) Whether the allegation of breach of duty of fair representation creates a factual and legal question which is not easily amenable to summary judgment - - and whether said allegation requires the District Court to specifically evaluate the union's conduct by objective criteria prior to rendering summary judgment?

STATEMENT OF THE CASE

This case is on appeal from the September 17, 1984, and October 3, 1984, orders of the United States District Court for the Western District of Louisiana, the Honorable Nauman S. Scott granting defendant's Motion for Summary Judgment.

A. PRIOR PROCEEDINGS

On April 28, 1983, plaintiff-appellant filed suit in the Fifth Judicial District Court of the State of Louisiana seeking damages in connection with a retaliatory discharge and breach of contract. *Record*, 12-16, [hereinafter referred to as "R. _____ . "]. Subsequent to the petition of the defendant seeking removal, the cause was removed to the

United States District Court for the Western District of Louisiana on the basis of federal diversity and the authority of the Labor Management Relations Act; *29 U.S.C. §185.* R. 1-6. Following the denial of appellant's Motion to Remand the Cause to the Fifth Judicial District Court, R. 50-56, the original complaint was amended to further allege the violation of a collective bargaining agreement, defamation, and the violation of civil rights. R. 83-90.

Defendant filed a Motion for Summary Judgment on May 3, 1984. R. 105-121. On August 13, 1984, the District Court conducted a chambers conference regarding the various questions presented by defendant's Motion for Summary Judgment. Due to confusion regarding the sequence of events surrounding discovery procedures and the complexity of the legal questions presented, the District Court allowed the parties an additional thirty (30) days within which to complete discovery and file necessary briefs. R. 149-150. Appellant's Response and Opposition to Defendant's Motion for Summary Judgment, which was accompanied by a detailed memorandum of law, was placed in the United States Mail on September 12, 1984. R. 154. Said documents were received and filed by the Clerk of the United States District Court for the Western District of Louisiana on September 13, 1984. R. 152.

The District Court granted defendant's Motion for Summary Judgment on September 17, 1984. R. 194-197. On September 20, 1984, appellant moved for a new trial, uring reconsideration of the earlier ruling on the basis of the memorandum of law filed in support of his Response and Opposition to Defendant's Motion for Summary Judgment. R. 200-243. The District Court issued an order affirming its earlier decision on October 3, 1984. R. 245. Notice of this Appeal was provided on October 11, 1984. R. 255.

B. STATEMENT OF THE FACTS

On October 13, 1982, appellant, an employee of Sun Pipe Line Company for approximately thirty-seven (37) years, received a message from company officials to be present at a meeting to be conducted in Monroe, Louisiana, the following day. Appellant immediately contacted Mr. Hank Face, his union representative, who was unaware of the exact nature of the meeting. Pursuant to the orders of company officials, appellant met with Sun representatives on the morning of October 14, 1982. The union representative, who had flown to Monore, Louisiana, from Longview, Texas, in order to be available to appellant for the meeting was not present at the meeting and did not consult with appellant at any time prior to or during the meeting. R. 122.

Following a brief interrogation by company investigators, appellant was notified of the termination of his employment with Sun Pipe Line Company on the same day, for allegedly violating "company policy." Appellant was not made aware of the particular grounds for his termination by either Sun officials or his union representative. R. 124.

Subsequent to the October 14, 1982, meeting there was no discussion between appellant and his union representative concerning the exhauston of administrative grievances as provided by the Collective Bargaining contract. At this time, appellant was under the impression that the general policy of his union was to avoid all potential conflicts with management by assuming a very limited role in the employee grievance process. Appellant's conclusion was based upon the fact that during the course of his lengthy employment, he had no independent recollection of any Sun employee filing a grievance against the company through the union representative. For this reason, appellant concluded that it would be futile to rely upon union representation and felt compelled to retain legal counsel. R. 175-179.

Appellant worked to and through October 16, 1982, which was designated as his separation date. R. 180. On the afternoon of October 20, 1982, appellant contacted the undersigned counsel in connection with the pursuit of all available remedies against his former employer. R. 177. On the same date, appellant contacted the Louisiana State Employment Security Office for the purpose of requesting unemployment compensation and ascertaining the reasons for his termination. R. 177. Appellant then requested a copy of his employment contract from his union representative for the purpose of pursuing all available administrative and judicial remedies. R. 177. The requested information was not supplied to appellant or his counsel for approximately six or eight days. R. 122.

It was not until November 1, 1982, that appellant was informed by the Louisiana State Employment Security Office that the action of Sun had been based upon aggravated misconduct in the form of alleged incidents of theft and dishonesty concerning the misappropriation of company property and labor. R. 17. On November 2, 1982, appellant, through the undersigned counsel, contacted Sun Pipe Line Company through Mr. Wendall A. Holloway, its southwest area manager, in an attempt to pursue all available administrative remedies. R. 181-182. On this occasion appellant informed Sun that his termination had represented nothing more than a form of harassment and retaliation directed against him in response to his official complaints regarding the company's violation of state and federal laws governing the production of oil. R. 181. On November 11, 1982, appellant's communication was referred to Mr. J. A. Ladner, Sun's chief legal counsel. R. 183. At no time subsequent to his November 2, 1982, communication did Sun, through any of its employees or representatives, notify appellant that his complaint had been denied on the merits or denied as untimely filed.

An administrative hearing was conducted by the Louisiana State Employment Security Office on January 27, 1983, with regard to appellant's application for unemployment compensation. On March 7, 1983, the Louisiana State Employment Security Office determined appellant to be fully eligible for unemployment compensation due to the failure of Sun to prove that he had been discharged for misconduct in connection with his employment. R. 21. Despite these findings, Sun officials took no action concerning appellant's pending complaint.

On April 28, 1983, appellant filed suit in the Fifth Judicial District Court of the State of Louisiana, alleging retaliatory discharge and the breach of contract. R. 16-21. Appellant's State Court pleading merely alleged that the company had breached the terms of the contract by terminating him without just cause, and did not specifically allege a violation of the Collective Bargaining Agreement. Subsequent to the petition of the defendant seeking removal, the cause was removed to the United States District Court for the Western District of Louisiana on the basis of federal diversity and the authority of the Labor Management Relations Act: *29 U.S.C. §185*. R. 1-6. Following the denial of appellant's Motion to Remand the Cause to the Fifth Judicial District Court, R. 50-56, the original complaint was amended to further allege the violation of a Collective Bargaining Agreement, defamation, and the violation of civil rights. R. 83-90. Appellant's deposition was taken on February 23, 1984. Defendant filed a Motion for Summary Judgment on May 3, 1984. R. 105-121.

C. THE DECISION OF THE DISTRICT COURT

Defendant's Motion for Summary Judgment contended that appellant failed to timely exhaust the internal grievance procedures available to him under Article VI of the Collective Bargaining Agreement, thus precluding the subsequent

judicial review of those claims arising from the termination of his employment. Defendant further urged that the failure of appellant to file his Section 301 suit in the District Court within six months of the date of his termination precluded judicial review under the National Labor Relations Act. With regard to each of these contentions, defendant suggested that the provisions of the federal labor policy preempted any and all state remedies which were otherwise available to appellant as a result of a retaliatory discharge and the intentional infliction of extreme emotional distress.

Appellant first noted that Article VI of the Collective Bargaining Agreement indicated that the internal grievance procedure was "strictly limited to disputes arising over the interpretation of [the] agreement," thus suggesting the inapplicability of a finality provision to the questioned cause. Assuming the necessity of adherence to the grievance procedure, appellant next contended that the stipulated period for filing of such grievance had been interrupted by the failure of the employer to promptly notify him of the actual reasons for his dismissal, as well as the employer's misleading response to his November 11, 1982, communication, which implied that his grievance was under some serious form of consideration. Moreover, appellant urged that the aforementioned conduct of his employer had likewise interrupted the six month prescriptive period which governed the filing of his Section 301 - - duty of fair representation suit.

Further, appellant, through a sworn affidavit, categorically denied the allegations made by his former union representative concerning his knowledge and subsequent waiver of internal administrative remedies. Appellant specifically contended that the labor organization certified to represent him in connection with the Collective Bargaining Agreement, the Sun Pipe Line Employees' Association, had breached its

duty of fair representation by failing to afford him meaningful assistance and representation in connection with the internal grievance process. Finally, appellant urged that his state tort claim was not preempted under the federal labor law since adjudication of the claim by a State Court would pose no serious threat of interference with the federal policy of industrial relations.

The District Court found that appellant had been advised of the termination of his employment and was fully aware of the existence of the Collective Bargaining Agreement, which required the exhaustion of internal grievances. R. 195. Without considering the conduct of the employer which had interrupted the period for filing said grievances, the District Court tersely concluded that appellant "chose not to file a grievance." R. 195. The District Court did not consider the full scope of the breach of duty of fair representation claim, but instead found that the union president had in fact solicited the filing of a grievance, which appellant chose not to file. R. 195. In addition, the District Court found appellant's state tort claim preempted by the exclusive application of federal labor law. R. 196-197.

It must be noted that the rather remarkable findings of the District Court were not based upon the testimony of witnesses, but mere affidavits in support of the summary judgment motion. Obviously, the District Court elected to accept defendant's affidavit as completely true, while totally disregarding appellant's deposition and affidavit as unworthy of belief. In this regard the District Court failed to recognize the numerous factual disputes upon which this case hinges. The question as to when appellant was actually informed of the underlying reasons for his termination is critical to the calculation of the period for filing of the grievance. Defendant's letter of dismissal did not fully state the grounds for termination. R. 124. The affidavits in support of summary judgment do not clearly state that appellant was in-

formed of the underlying reasons for his termination at the time of his dismissal. R. 122-123. Appellant's affidavit, which is consistant with his earlier deposition, clearly states that he was not informed of the essential facts at the time of his dismissal. R. 175-179. Yet, the District Court concluded without hesitation that appellant was adequately "advised of the termination." R. 195. This is obviously a question of fact which cannot be reliably determined by way of summary judgment.

Likewise, the question as to whether appellant was made aware of his right to initiate a grievance by his union representative, and intelligently elected to forego such remedy is critical in the assessment of the duty of fair representation question. The affidavit of the union representative states that appellant was made aware of the grievance process, but does not indicate that appellant elected to forego all available internal remedies. To the contrary, the affidavit of the union representative suggested that appellant had elected to forego union participation in the matter in order to allow "his own lawyer to handled [the] case." R. 122. Appellant's affidavit, which is corroborated by his deposition, clearly states that he was not informed of his right to process a grievance with the assistance of his union representative, and did not waive his right to such internal procedures. R. 175-179. Although the resolution of this factual question clearly rested upon the credibility of the two affiants, the District Court inexplicably found that appellant "chose not to file a grievance." R. 195. This is another question of fact which cannot be determined by way of summary judgment.

Moreover, the District Court failed to fully explore the scope of the factual and legal question presented by the duty of fair representation claim. The unique circumstances presented by the duty of fair representation claim required the District Court to at least attempt to evaluate the union's conduct by objective standards prior to rendering summary

judgment upon the rather vague affidavit of one union representative. For these reasons, the ruling of the District Court represents an abuse of the summary judgment process.

SUMMARY OF ARGUMENT

The decision of the District Court granting summary judgment in the instant cause is inconsistent with both the facts contained within the record and the jurisprudential rules governing the summary judgment process.

Appellant presented the District Court with several genuine issues of material fact which militated against the issuance of summary judgment. In the first instance, it is urged that appellant's unawareness of the precise reasons underlying his termination served to interrupt the delay or prescriptive period governing both the grievance process and a Section 301 - - duty of fair representation suit. Moreover, it is suggested that the conduct of the employer follow the receipt of a communication from appellant's counsel, which indicated that his grievance was under consideration, lulled appellant into inaction with regard to the exhaustion of grievance procedures and the filing of his Section 301 - - duty of fair representation suit. Secondly, it is contended that appellant was never informed of his right to process a grievance with the assistance of his labor organization, and never waived or elected to forego his internal remedies under the collective bargaining agreement.

Additionally, appellant raised a breach of duty of fair representation claim and suggested that any technical noncompliance with the grievance process was directly attributable to the union's inept representation. This claim hinges upon a credibility choice between appellant and his union representative, as to whether appellant was aware of his rights under the collective bargaining process and intelligently elected to forego all remedies. Moreover, this aspect

of the claim presented a mixed question of fact and law which required the District Court to reliably determine the disputed facts and then evaluate the union's conduct by objective criteria. The resolution of this aspect of appellant's claim will involve some discussion concerning the proper standard to be utilized by the lower federal courts in evaluating the union's statutory duty to the employee. It is urged that recent case law developments strongly favor an objective standard which allows for the recovery of compensatory damages upon a showing of something less than intentional misconduct on the part of the union.

Finally, a portion of appellant's claim is premised upon state tort law: i. e. intentional infliction of extreme emotional distress. This aspect of appellant's claim is not preempted by the exclusive application of federal labor law, since the disposition of such claim by the state tribunal poses no substantial threat to the interests promoted by the federal labor policy.

ARGUMENT

A. THE EXHAUSTION OF REMEDIES

Article VI of the Collective Bargaining Agreement applicable to the employees of Sun Pipe Line Company provides for a five-step grievance procedure which must be initiated within fifteen (15) days ". . .after the occurrence of the incident complained of, or after its occurrence becomes *known to the employee* or employees concerned." R. 72. (Emphasis added.) It is worth noting that Subsection 2 of Article VI indicates that the grievance procedure is "strictly limited to disputes arising over the interpretation of this Agreement." R. 72.

In the first instance, it should be noted that appellant's claim in no way involves a dispute which arises from the interpretation of any term or condition of the Collective Bargaining Agreement. Appellant's claim simply involves conduct on the part of the defendant which is outrageous and contrary to public policy. As such, it is unlikely that the questioned complaint is susceptible to the ordinary grievance process. In any event, the facts of the instant case show that appellant attempted to exhaust all available administrative remedies, to no avail.

An individual employee may bring a suit against his employer pursuant to Section 301 of the National Labor Management Relations Act in connection with an unfair labor practice which is deemed to violate a Collective Bargaining Agreement. *Smith v. Evening News Association*, 371 U.S. 195, 83 S.Ct. 267 (1962). Prior to resorting to such judicial remedies, the aggrieved employee is ordinarily required "to *attempt* to exhaust any grievance or arbitration remedies procided in the Collective Bargaining Agreement." See, *DelCostello v. International Brotherhood of Teamsters*, _____ U.S. _____, 103 S.Ct. 2281 (1983), citing, *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614 (1965), (emphasis added).

It should be observed that the application of the *Maddox*

rule does not create an inflexible or airtight procedural default mechanism which serves to automatically bar all employee complaints filed under such circumstances. As will be more fully discussed in Section "B" of this argument, an exception to the general rule of exhaustion is recognized when the contractual mechanism has been seriously impaired and flawed by the union's breach of duty of fair and adequate representation. *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967). As such, enforcement of the so-called "finality provision" is conditioned upon the employee's union having fully satisfied its statutory duty of fair representation of all employees in connection with arbitration proceedings. *Hines v. Anchor Motor Freight*, 424 U.S. 554, 96 S.Ct. 1048 (1976). For the purposes of this portion of the argument, it is sufficient to point out that an aggrieved employee may be relieved of the duty to comply with exhaustion requirements when he is simply able to show that "he *attempted* to utilize the contractual procedures for settling his dispute with his employer. . . ." Id. 424 U.S. at 563 (emphasis added). Without specifically asserting the question of "fair representation" at this stage of the argument, appellant is able to show that contractual grievance procedures were fully exhausted by his good faith effort to utilize all channels available for the resolution of his dispute with his employer.

Assuming the existence of a valid and binding collective bargaining instrument, it is urged that appellant in the instant case made a diligent and good faith effort to substantially comply with the terms and conditions of the grievance procedure available to him. At the outset, it must be reiterated that the language of the contract drafted by the employer provides that the fifteen (15) day prescriptive period begins to toll when the facts giving rise to the grievance become "known to the employee." The crux of appellant's contention is simply that he was not made aware of the grounds of the company's action at the time of his termination.

The vague and conclusory allegation that appellant had

violated a company policy did not serve to adequately notify him of the essential facts serving as the formal basis of the charge and thereby commence the tolling of the fifteen (15) day period. The October 14, 1982, communication which was hand delivered to appellant did not explain or clarify the actual grounds for appellant's termination; i. e. theft and dishonesty. R. 124. The affidavits of Hank Face and Larry D. Collins, which were submitted in support of the Motion for Summary Judgment do not positively state that appellant was informed of the underlying reason for his sudden termination at the time of his dismissal. R. 122-123. As such, no evidence within the record exists to support the District Court's conclusion that appellant was adequately "advised of his termination." R. 195.

The only evidence within the record relating to the information initially received by appellant is his affidavit, in which he stated that he was not aware of the facts giving rise to his termination until November 1, 1982. R. 175-179. It is extremely significant that appellant's August 14, 1984, affidavit is corroborated by his February 23, 1984, deposition. (See, Herford deposition, pp. 24 and 28.) The only evidence contained within the record points to the fact that appellant consulted legal counsel within two days of his termination and immediately requested a copy of his contract from his union representative in order to enable counsel to effectively process a grievance on his behalf. The affidavit of Hank Face indicates that appellant contacted him on October 20, 1982, ". . . and wanted to know if he was still a member of the Association and requested an agreement book." R. 122. It is urged that such statements, which were attributed to appellant within six days of his termination, do not reflect an intent to forego all internal grievances. Such statements, if indicative of any state of mind, reveal appellant's well founded belief that his union was incapable of representing him in an honest and even-handed manner.

Whatever delay resulted in filing the grievance, it is apparent that such delay was attributable to the employer. No evidence contained within the record even remotely tends to indicate that appellant was fully and adequately advised of the specific nature of the allegations supporting his discharge prior to November 1, 1982, at which time he was furnished such information by the Louisiana State Employment Security Office in response to his application for unemployment compensation. R. 17-21. From this uncontradicted fact it is readily apparent that appellant availed himself of whatever collective bargaining remedies which might have been available to him within twenty-four (24) hours of receiving notice of the particular facts giving rise to the incident.

It is extremely relevant to note that subsequent to the November 2, 1982, communication, no agent or representative of Sun informed appellant or his counsel that his request had been denied. Instead, representatives of Sun continued to discuss the possibility of an amicable settlement with appellant, through the undersigned counsel, for several months. The November 11, 1982, communication of J. A. Ladner, which was written on behalf of Sun in response to appellant's grievance, indicated that additional time was needed for response. R. 183. The November 19, 1982, communication from undersigned counsel to appellant indicates that counsel subjectively believed that serious negotiations were underway. R. 184-185. The February 24, 1983, communication from J. A. Ladner to the undersigned counsel very clearly implies that some type of formal discussion was scheduled or anticipated regarding appellant's situation. R. 186. This conduct on the part of company officials and representatives served to interrupt all applicable prescriptive periods by lulling appellant into misapprehension and inaction. Because appellant was literally "sandbagged" by company and union officials, any noncompliance with the technical rules of the grievance procedure should be excused in this instance.

Louisiana jurisprudence recognizes certain limited exceptions to the statutorily created prescriptive periods governing various causes of action. Such an exception is applicable when the plaintiff is unable to exercise his cause of action at the time it accrues. *Trainer v. Aycock Welding Co.*, 421 So.2d 416, 418 (La.App.1st Cir. 1982). In the instant diversity case the Louisiana jurisprudence governing prescription and the exceptions to the general rules of prescription is binding upon this Court. *Sprinkle v. Farm Bureau Insurance Companies*, 492 F.2d 469, 471 (5th Cir. 1974). The ancient civil doctrine of *contra non valentem agere nulla curril praescriptio* recognizes that no prescription runs against a person unable to bring an action. *Brown v. State, through Dept. of Corrections*, 354 So.2d 633, 635 (La.App.1st Cir. 1978). Four judicially recognized situations in which the principle of *contra non valentem* may be applied include:

> "Where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2). Where there was some condition coupled with the contract as connected with the proceedings which prevented the [plaintiff] from suing or acting; (3). Where the [defendant] himself has done some act effectively to prevent the [plaintiff] from availing himself of his cause of action; and (4). Where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant."

See *Corsey v. State, through Dept. of Corrections*, 375 So.2d 1319, 1321-1322 (La. 1979). It is urged that the basic principles governing prescriptive requirements are equally applicable to those cases in which a party has been prevented

from exhausting certain remedies which are a necessary prerequisite to litigation.[1]

In the instant case the failure of Sun to immediately disclose the actual reason for appellant's termination prevented him from timely exhausting those remedies supposedly available under the Collective Bargaining Agreement. As well, the action of Sun, which induced appellant and the undersigned counsel to believe that the communication of November 2, 1982, was being considered, prevented appellant from resorting to judicial remedies under Section 301 of the National Labor Relations Act, and further serves to estop defendant from now asserting a technical noncompliance with contractual remedies. For this reason, appellant's communication of November 2, 1982, should be deemed adequate compliance with contractual remedies so as to avoid summary dismissal of this action. Moreover, as is fully discussed in Section "B" of this argument, the action of Sun should be viewed so as to interrupt the six month prescriptive period for filing of this complaint under Section 301 of the National Labor Relations Act.

The factual allegations contained within the Herford affidavit clearly reflect a substantial factual dispute surrounding the circumstances upon which appellant first became aware of the grounds of his discharge, not to mention appellant's purported waiver of internal remedies. Considering the contentions of appellant in view of the record, it is

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1. In addition to preventing appellant from promptly filing a grievance within the fifteen (15) day period, the nondisclosure of certain facts by Sun additionally prevented appellant from filing a suit against his employer for the breach of a collective bargaining contract and his union for a breach of their duty of fair representation within the six month prescriptive period. Had the defendant not lulled appellant into inaction by ostensibly considering his November 2, 1982, letter as a grievance, appellant would have filed a suit against his employer and his union within the month of November 1982.

simply inconceivable that the District Court could find summary judgment to be appropriate. See, *Baldini v. Local No. 1095, Intern. U., Etc.*, 581 F.2d 145 (7th Cir. 1978).

B. THE ABSENCE OF FAIR REPRESENTATION

As previously noted, the rigid enforcement of the co-called "finality provision" with regard to the exhaustion of collective bargaining remedies is contingent upon the employee's union performing its statutory duty of fair representation of all employees as their collective bargaining representative. In *Vaca v. Sipes*, supra, the United States Supreme Court acknowledged that a suit alleging wrongful discharge in violation of a Collective Bargaining Agreement was not barred or preempted when the union had arbitrarily, and without cause, failed to arbitrate the grievance. In *Hines v. Anchor Motor Freight, Inc.*, supra, the Court reiterated the rule of *Vaca* under circumstances in which the union had failed to adequately discharge its affirmative duty of fair representation by investigating easily discoverable evidence which would have completely undermined allegations of employee dishonesty. *Hines* clearly stands for the proposition that a wrongfully discharged employee should not be left without a job and a remedy when the union has failed to perform its duty of fair representation in connection with arbitration proceedings.

(i). The Proper Standard of Fair Representation

The concept of fair representation is based upon the notion "that the labor organization chosen to represent a craft is to represent all of its members, the majority as well as the minority, and is to act for, and not against those whom it represents." *Steel v. Louisville & N.R. Co.*, 323 U.S. 192, 210-212, 65 S.Ct. 226 (1944). "The duty of fair representation has stood as the bulwark to prevent arbitrary union conduct against individuals stripped of traditional

forms of redress by the provisions of the federal labor law." *Vaca v. Sipes*, supra, 386 U.S. at 182.

The *Vaca* decision indicated that a breach of the duty of fair representation would be found when union conduct was arbitrary, discriminatory, or in bad faith - - or when a meritorious grievance had been processed in a perfunctory manner. This language clearly implies that grossly ineffective union representation will amount to a breach of its duty of fair representation. Later decisions of the United States Supreme Court have apparently relied upon the "bad faith" language of *Vaca* and required some degree of intent to accompany careless and inept union conduct in order for a breach of the duty of fair representation to be found. *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299, 91 S.Ct. 1909 (1971), (substantial evidence of fraud, deceitful action, or dishonest conduct must appear in order to establish breach of duty of fair representation). This conflicting language has prompted disagreement among the circuits and the scholars.

Several circuits have interpreted the so-called "bad faith" prong of *Vaca* to indicate that ordinary negligence, without more, is insufficient to sustain a breach of duty of fair representation. See, *Cote v. Eagle Stores, Inc.*, 688 F.2d 32 (7th Cir. 1982); *Harris v. Scherman Trucking Co.*, 668 F.2d 1204 (11th Cir. 1982); *Riley v. Letter Carriers Local No. 380*, 668 F.2d 224 (3rd Cir. 1981); and *Wyatt v. Ocean Transport Co.*, 623 F.2d 888 (4th Cir. 1980).

In *Ruzicka v. General Motors Corp.*, 649 F.2d 1207 (6th Cir. 1981), the Sixth Circuit determined that union good faith negligence in processing an employee grievance would not amount to a breach of its statutory duty of fair representation. It is worth noting that none of the cases which appear to fashion an intentional conduct standard require a degree of intent approaching common law malice

or a particular hostile motive. See, note, *Labor Arbitration, the Duty of Fair Representation, and Union Negligence*, 54 St. John's L. Rev. 357, 366 (1980).

Other courts have recognized that the *Ruzicka* intentional conduct standard may not adequately protect the substantial interests of the individual employee victimized by a wrongful discharge and ineffective union representation. *DeArroyo v. Sindicate de Trabajadores Packing*, 425 F.2d 181 (1st Cir. 1970). These decisions have interpreted the "arbitary" conduct language of *Vaca* to imply an elastic concept which is capable of encompassing varying degrees of negligence, ranging ordinary negligence to gross negligence. In *Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082 (9th Cir. 1978), the Ninth Circuit equated arbitrary conduct with irrational and unreasonable decisions and provided that "arbitrary conduct is not limited to intentional conduct." Pursuant to this gross negligence standard, certain acts of omission by union representatives which are not specifically intended to cause harm may be so egregious and so far short of minumum standards of fairness as to be deemed arbitrary.

The *Vaca* reference to arbitrary conduct, coupled with *Hines* language which soundly condemned wholly inadequate investigation, indicates that a union decision to forego grievance procedures in a particular case must rest upon objectively justifiable grounds. See, Comment, *The Duty of Fair Representation: The Emerging Standard of the Union's Duty in the Context of Negligent, Arbitrary or Perfunctory Grievance Administration*, 46 Mo. L. Rev. 142, 149 (1981). This objective approach recognizes that a union must take a plausible grievance seriously and undertake an objectively reasonable and good faith effort to investigate and process the grievance in an honest and even-handed manner. Union decisions concerning the merit of a particular grievance must be premised upon relevant and competent considerations which are based on objective and rational criteria. The

Seventh Circuit has adopted an objective standard which attempts to determine whether the conduct of the union within the particular factual situation was "within the range of acceptable performance by a collective bargaining agent." *Baldini v. Local 1095*, supra, 581 F.2d at 151. This objective standard, which has evolved from the "arbitrary-perfunctory" prong of *Vaca* and *Hines*, indicates that under some circumstances, a union's reasons for failing to exhaust the grievance process may be too insubstantial to support its action, irrespective of the absence of direct evidence pointing to improper union motive. See, Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 Tex. L. Rev. 1119, 1139 (1973).

The recent decision of the United States Supreme Court in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 99 S. Ct. 2121 (1979), offers some clear direction for the future and serves as the basis for the adoption of a negligence standard in duty of fair representation cases. *Foust* involved a situation in which an employee suffered an on the job injury which resulted in his being placed on a medical leave of absence. The disabled employee was eventually terminated after he failed to properly seek an extension of his leave as required by the rather technical and demanding terms of the Collective Bargaining Agreement. Following the employee's discharge, the union failed to timely file a grievance challenging the dismissal. A Section 301 duty of fair representation suit was initiated and the jury ultimately awarded compensatory and punitive damages after being instructed that the union's conduct was to be evaluated pursuant to a standard of reasonableness. The Tenth Circuit affirmed and the United States Supreme Court reversed the award of punitive damages. While the majority found an award of punitive damages to be unavailable in duty of fair representation cases, no portion of the majority opinion addressed the standard of conduct by

which the jury was instructed to evaluate the union's conduct.

More importantly, the separate concurring opinion of Mr. Justice Blackmun, which was joined by the Chief Justice and Justices Rehnquist and Stevens, observed that punitive damages were inappropriate in the particular case simply because the union's conduct was negligent rather than malicious. 442 U.S. at 60-62. The reasoning of Justice Blackmun's separate opinion implies that at least four members of the United States Supreme Court are inclined to allow an award of compensatory damages for the negligent breach of the duty of fair representation. It is worth noting that Justice Blackmun's remarks have been interpreted by at least one commentator to suggest that a negligence standard for liability in a duty of fair representation case, while insufficient to ever trigger an award of punitive damages, may nonetheless represent an appropriate standard for the award of compensatory damages. See, Steinhauser, *IBEW v. Foust: A Hint of Negligence in the Duty of Fair Representation*, 32 Hastings L. J. 1041 (1980). It is urged that the implications of the *Foust* decision, and particulary the Blackmun concurrence, allow the lower federal courts to fashion a negligence standard in connection with duty of fair representation cases.

(ii). The Representation Rendered in the Instant Case

It is urged that the conduct of the labor organization in the instant case amounted to a breach of its statutory duty of fair representation. This is so whether the union's conduct is evaluated pursuant to the negligent conduct standard or intentional conduct standard.

The affidavit of Hank Face, which was submitted by defendant in support of the Motion for Summary Judgment, shows that the union president, after being informed of the scheduled meeting and the seriousness of the charges, stood

idly by without attempting to render favorable to the union indicates that the full extent of its duty to a thirty-seven (37) year employee was limited to a mere reference to the availability of the grievance process. R. 122.

The uncontradicted facts show that the union representative was so disinterested in the matter that he completely failed to ask appellant whether he had in fact committed the charged offenses. R. 122. It is apparent that the union representative was content to evaluate appellant's posture upon the basis of a hearsay statement of a Sun employee which indicated that appellant had admitted the charges. R. 122. It is extremely relevant that the deposition of Larry D. Collins, one of the Sun employees present at the closed-door session with appellant, fails to mention that appellant admitted any of the charges. R. 123. The simple fact of the matter is that Mr. Face assumed appellant's guilt in order to avoid any friction which might jeopardize his rather cozy relationship with high-ranking Sun officials.

The labor organization abandoned appellant without even so much as interviewing him or conducting the most rudimentary investigation. It is urged that if the union had undertaken any type of serious investigation, it would have readily discovered those facts which were so dramatically confirmed at the Louisiana Employment Security hearing; i. e., that the employer was unable to bear its burden of proving that appellant was discharged for misconduct connected with his employment. R. 21. It is especially noteworthy that during the course of the January 27, 1983, hearing, the defendant was unable to produce any of the witnesses having first-hand knowledge of appellant's alleged misconduct. R. 19. It is urged that such witnesses are non-existent.

The total circumstances clearly show that the labor union

failed to render even a modicum of the representation required by the situation. This slovenly and inept performance is comparable to the union conduct which was soundly condemned by the United States Supreme Court in *Hines v. Anchor Motor Freight, Inc.*, supra. It is urged that an honest and loyal career employee should not be subjected to such abuses at the hands of a mercenary employer and incompetent union, and thereby condemned to forfeit significant property interests, without even so much as an opportunity to be heard. Because the integrity of the collective bargaining scheme was totally undermined and corrupted by such reprehensible practices, appellant is entitled to a federal forum.

(iii). Procedural Considerations

Once appellant resorts to the absence of fair representation in order to avoid the preclusion of his claim due to noncompliance with collective bargaining remedies, his complaint is classified as a "hybrid" action; that is, one involving both the breach of a Collective Bargaining Agreement and the breach of duty of fair representation. *Farr v. H. K. Porter Co., Inc.*, 727 F.2d 502, 505 (5th Cir. 1982). Obviously, a finding that appellant complied with available collective bargaining grievance procedures will obviate the necessity of formally classifying the complaint for the purpose of consideration under the *Vaca* and *Hines* line of cases.

Assuming, for the sake of this argument alone, that collective bargaining grievance procedures were not adequately exhausted, the failure to exhaust such internal remedies against the employer does not preclude the filing of a "hybrid" action against the employer, the union, or both. Such a "hybrid" action is governed by the six month period of limitation set forth by Section 10(b) of the National Labor

Relations Act, *29 U.S.C. §160(B)*. See, *DelCostello v. International Brotherhood of Teamsters*, supra, 103 S.Ct. at 2285, (the six month limitation period provided by the National Labor Relations Act for the filing of unfair labor practices charges is the same statute of limitations applicable to an employee action against the employer and the Union for the breach of a Collective Bargaining Agreement and violation of the duty of fair representation, in that such action has no close analogy in state law.)[2] However, the retrospective application of the *DelCostello* rule to the facts of the instant case does not automatically bar consideration of the claim due to the failure of appellant to file the complaint within six months of the date of his termination.

In order to determine the actual date upon which the six month period prescribed by Section 10(b) of the National Labor Relations Act commenced, the Courts must look to the date when the plaintiff was, or reasonably should have been, aware of the injury. *Farr v. H. K. Porter Co., Inc.*, supra, 727 F.2d at 505, citing, *Benson v. General Motors Corp.*, 716 F.2d 862, 864 (11th Cir. 1983). As noted previously in this argument, appellant was not adequately informed of the operative facts giving rise to his termination

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2. By comparison, those suits which are based upon a "straight breach of contract," and do not allege a violation of the duty of fair representation, are governed by the applicable state law governing prescription. See, *International Union of Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S.Ct. 1107 (1966), and *Farr v. H. K. Porter Co., Inc.*, supra, 727 F.2d at 505. Appellant might well suggest, in the alternative to a "hybrid" action, that he has filed a "straight breach of contract" suit in connection with the employer's decision to terminate him without just cause. Such an action might be brought in this Court since the language of the Collective Bargaining Agreement appears to limit the grievance process to those disputes "arising over the interpretation of [the Collective Bargaining] Agreement."

until November 1, 1982, eighteen days following the formal notice of his termination. The inexcusable failure of the employer to promptly disclose those basic facts which would have immediately informed appellant of his cause of action, as well as that conduct which lulled appellant into inaction based upon the mistaken impression that a grievance or administrative complaint was under serious consideration, effectively served to interrupt the six month prescriptive period. *Corsey v. State, through Dept. of Corrections*, supra. The notion that a prescriptive period may be interrupted by the action of a defendant which prevents the plaintiff from asserting a cause of action is not limited to the Louisiana jurisprudence. In *DelCostello v. International Brotherhood of Teamsters*, supra, 103 S.Ct. at 2294, the United States Supreme Court specifically noted the possibility that certain events might have served to interrupt the tolling of the six month prescriptive period. In this regard the contention of appellant is in no way inconsistent with the latest pronouncement of the United States Supreme Court in *Delcostello*, a case extensively cited and relied upon by Sun.

Moreover, it should not be forgotten that a large portion of appellant's cause of action is based upon state tort law. That portion of appellant's complaint which alleges the intentional infliction of extreme emotional distress is founded upon the false accusations of theft and dishonesty in connection with the misappropriation of company property and labor. Considering such, the allegation of theft and dishonesty, which first became known to appellant on November 1, 1982, constituted the actual injury complained of rather than the earlier discharge.

C. *Preemption of State Remedies*

Defendant urges that appellant's state tort claim is preempted by Sections 7 and 8 of the National Labor Relations Act, which supposedly require the exclusive application of

federal law to those claims involving unfair labor practices and the breach of a Collective Bargaining Agreement.

Pursuant to the doctrine of preemption, the states are precluded from exercising power over a particular area of activity which threatens to interfere with the federal policy of industrial relations. *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 77 S.Ct. 598 (1957). This concept does not preclude the states from exercising their power to regulate that activity which may be perceived as a peripheral concern of the Labor Management Relations Act. *San Diego Building Trades Council, etc., v. Garmon*, 359 U.S. 245, 79 S.Ct. 773, 779 (1959). The United States Supreme Court has refused to apply the preemption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909 (1971).

In *Farmer v. Carpenters*, 430 U.S. 290, 97 S.Ct. 1056 (1977), the United States Supreme Court determined that the National Labor Relations Act did not preempt a state tort action for intentional infliction of emotional distress arising in connection with alleged employment discrimination, since there is no federal protection for conduct which is so outrageous "that no reasonable man in a civilized society should be expected to endure it." 430 U.S. at 302. Under such circumstances the potential for state interference in the federal policy of industrial relations is insufficient to counterbalance the legitimate and substantial interest of the state in protecting its citizens. 430 U.S. at 304.

Pursuant to the *Farmer* decision, petitioner's tort claim is not preempted by federal law. As such, it appears that recent panel opinions of this Court relied upon the defendant

are somewhat inconsistent with the rule of law established by the United States Supreme Court in the *Farmer* decision. Compare, *Ramsey v. Signal Delivery Service, Inc.*, 631 F.2d 1210 (5th Cir. 1980), and, *Mobile Mechanical Contractors Association v. Carlough*, 664 F.2d 481 (5th Cir. 1981).

D. The Applicability of Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure allows the issuance of a summary judgment if the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits, show the absence of a genuine issue as to material fact, and suggest that the moving party is entitled to a summary judgment as a matter of law. The issuance of a summary judgment is appropriate only when the total facts, viewed in the light most favorable to the nonmoving party, clearly indicate the absence of a genuine issue as to material fact.

The summary judgment process is not generally favored in cases involving complex factual issues and extensive factual determinations. *Cronin v. Midwestern Okl. Dev. Corp.*, 619 F.2d 856 (10th Cir. 1980), and, *Solinger v. A. & M. Records, Inc.*, 586 F.2d 1304 (9th Cir. 1978). As in evident from the Herford affidavit, a substantial factual dispute exists concerning the date and circumstances upon which appellant first became aware of the factual allegations leading to his termination, and the conduct of Sun which encouraged him to believe that his grievance was being seriously considered. As well, there exists a factual controversy as to whether the union breached its duty of fair representation by failing to investigate certain evidence and assist petitioner in the internal grievance process. Such factual disputes suggest that the instant case is not amenable to summary judgment. *Baldini v. Local Union 1095, Intern. U.,etc.*, supra, 581 F.2d at 149-151, (where a choice of inferences is possible from summary judgment materials, the inference must be drawn

that favors the party resisting summary judgment).

It is urged that summary judgment is a harsh and drastic measure which should be utilized with caution in extremely rare instances. See, *Sobel v. Yeshiva University*, 477 F.Supp. 1161 (S.D.N.Y. 1979), and, *Giordano v. Lee*, 434 F.2d 1227 (8th Cir. 1971), (summary judgment is an extreme remedy which should be sparingly employed). This Court has observed that "summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill in its use." *Brunswick Corporation v. Vineberg*, 370 F.2d 605, 612 (5th Cir. 1967).

The record in the instant cause shows that the District Court misapplied the rules governing summary judgment by actually drawing factual inferences in favor of the moving party. The order granting summary judgment must be reversed and remanded to the District Court for further proceedings.

CONCLUSION

WHEREFORE, plaintiff-appellant Henry G. Herford respectfully requests that the order of the United States District Court for the Western District of Louisiana granting summary judgment in the instant cause be reversed and remanded to the lower Court for further preceedings.

Respectfully submitted,

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CERTIFICATE

I hereby certify that an exact copy of the foregoing Original Brief on Behalf of Plaintiff-Appellant Henry G. Herford has been provided Hon. A. Richard Gear, Hudson, Potts & Bernstein, attorney of record for Defendant-Appellee Sun Pipe Line Company, 10th Floor, Ouachita National Bank Building, Monroe, Louisiana, 71210, by placing same in the U.S. Mail, postage prepaid, this 9th day of January, 1985.

/s/ PAUL KIDD
OF COUNSEL